Arah Muara Sdn Bhd & Ors v Dato' Sri Hj Solah bin Mat Hassan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21 NCVC-58–08 OF 2013
YEOH WEE SIAM J
1 MARCH 2016

Tort — Conspiracy — Conspiracy to injure plaintiff — Implementation of motorcycle programme — Campaign for public — Licence obtained at cost lower than agreed — Whether defendants committed tort of conspiracy against plaintiffs — Whether there was breach of statutory duty — Whether there was unfair discrimination — Road Transport Act 1987 ss 2 & 3(2)

The plaintiffs, driving institutes and licensed permit holders licensed under the Motor Vehicles (Driving Schools) Rules 1992 ('the 1992 Rules'), claimed that the defendants committed the tort of conspiracy, that the first defendant ('D1') has breached his statutory duty under the RTA, and that the latter and the Road Transport Department (Jabatan Pengangkutan Jalan) ('JPJ') had practised unfair discrimination against the plaintiffs. Dispute arose as a result of the implementation of the BL1M programme, which was a campaign for the public to obtain a Class B2 motorcycle licence ('B2 licence') at a lower cost. In early 2012, the second defendant ('D2') proposed to D1 to introduce a special programme for obtaining the B2 licence. The JPJ held a meeting to discuss the implementation of the pilot programme. A post-mortem meeting was later held to discuss the pilot programme ('post-mortem meeting'). D2 wrote to D1 informing D1 that the BL1M programme ought to be implemented throughout Malaysia. D2 also proposed, inter alia, that the same terms under the pilot programme, including the registration fee of RM198, be applied for the BL1M programme. D1 informed D2 that JPJ did not have any objection to the implementation of the BL1M programme. Subsequently, a few meetings were held by JPJ to discuss the implementation of the BL1M programme. The BL1M programme was launched with the registration fee fixed at RM199 instead of RM198. After the BL1M programme was launched, JPJ called for further meetings as there were various setbacks in implementing the BL1M programme due to the lack of cooperation from driving institutes. The plaintiffs filed this action, seeking the reliefs of a declaration that the BL1M programme contravenes the law, an injunction against D2 and the third defendant ('D3') from implementing the BL1M programme, and general damages, interests and costs. D3 has made a counterclaim against the plaintiffs for general damages, exemplary damages, and an injunction against the plaintiffs from taking any legal action of a similar nature and as pleaded to other legal tribunals. The issues that arose were: whether the defendants have

committed the tort of conspiracy against the plaintiffs; whether D1 had breached his statutory duty under s 3(2) of the Road Transport Act 1987 ('the RTA') read together with s 2 of the same Act; and whether there was unfair discrimination practised by D1 and JPJ against the plaintiffs.

Held:

(1) D2 testified that the advertisement was prepared but D1 could not remember whether he had ever agreed to or supported the use of the JPJ logo in the advertisement for the BL1M programme and in BL1M's website. As far as he could remember, his officer or the party preparing the logo on the website did not get his consent. D1's evidence based on his vague memory was not convincing. By the fact that JPJ's logo was printed, together with the logos of SHEB and D3, in the advertisement and the BL1M website for the BL1M programme, it gives rise to the inference that D1 and JPJ were lending their support to the programme (see para 47).

(2) Notwithstanding the absence of a written or express agreement being made by D1 and JPJ, with D2 and SHEB, and D3, it could be inferred from the evidence that from the time of the meeting, there was an informal agreement, arrangement or understanding by these parties to enable the launch of the BL1M programme. The court was satisfied that there is an informal agreement, understanding or arrangement that D1 and JPJ would cooperate and work together with D2 and SHEB, and D3 for the implementation and management of the BL1M programme (see paras 48 & 52).

(3) The JKPIM circular fixed the maximum fee of RM211 that could be charged by any driving institute for the B2 licence. If any driving institute charges above the maximum fee allowed, then the driving institute commits an offence. However, the JKPIM circular was silent on making it an offence if any driving institute charges less than the RM211 fee that is prescribed in the circular. When the pilot programme was implemented in Pekan, Pahang, the registration fee charged was RM198, and therefore below the fee of RM211 fixed under the JKPIM circular. When D2 and D3 charged each candidate for the B2 licence the registration fee of RM199, it was not unlawful because there is nothing provided in the JKPIM circular to state that it was prohibited, or was an offence (see paras 64–65).

(4) There was no cogent evidence adduced by the plaintiffs to show that the defendants conspired with each other with the intention to injure each and every one of the plaintiffs, as specific targets, and thereby causing economic loss. The plaintiffs have the liberty to decide whether to participate in the BL1M programme or otherwise. In this case, they opted not to participate in the programme. The plaintiffs have failed to

prove the second element of the tort of conspiracy, namely, to prove the common purpose or intention to injure the plaintiffs with economic loss (see paras 77–78).

(5) Nowhere in the statement of claim did the plaintiffs plead that they suffered special damages due to the defendants' tort of conspiracy. The plaintiffs' decrease in the number of registered candidates at their driving institutes was not caused solely by the BL1M programme. The other factors have to be considered as well. Therefore, the plaintiffs have failed to prove that the alleged damage suffered by them respectively is as a result of the defendants' acts of conspiracy. The plaintiffs took no measures to mitigate their losses (see paras 30, 79 & 105–106).

(6) Based on the facts of the case, the plaintiffs have sustainable causes of action which gave rise to serious issues to be tried. Thus, it could not be held that the plaintiffs had abused the court process or had been malicious by filing this action against D3. The plaintiffs' claim against D1 to D5 was dismissed with costs. D3's counterclaim against the plaintiffs was also dismissed (see paras 133 & 138).

[Bahasa Malaysia summary

Plaintif-plaintif, institusi memandu dan pemegang permit berlesen yang dilesenkan di bawah Kaedah-Kaedah Kenderaan Motor (Sekolah Memandu) 1992 ('Kaedah-Kaedah 1992'), mendakwa defendan melakukan tort konspirasi, bahawa defendan pertama ('D1') telah melanggar kewajipan statutorinya di bawah RTA, dan bahawa defendan pertama dan Jabatan Pengangkutan Jalan (Jabatan Pengangkutan Jalan) ('JPJ') mengamalkan diskriminasi tidak adil terhadap plaintif. Pertikaian timbul akibat daripada pelaksanaan program BL1M, yang merupakan kempen untuk orang ramai mendapatkan lesen motosikal Kelas B2 ('lesen B2') pada kos yang lebih rendah. Pada awal tahun 2012, defendan kedua ('D2') mencadangkan kepada D1 untuk menyediakan program latihan khusus untuk mendapatkan lesen B2 tersebut. JPJ mengadakan satu mesyuarat untuk membincangkan pelaksanaan program perintis. Satu mesyuarat bedah siasat kemudiannya diadakan untuk membincangkan program perintis ('mesyuarat bedah siasat'). D2 menulis kepada D1 memaklumkan D1 bahawa program BL1M seharusnya dilaksanakan di seluruh Malaysia. D2 juga mencadangkan, antara lain, bahawa syarat-syarat sama di bawah program perintis, termasuk yuran pendaftaran sebanyak RM198, digunakan untuk program BL1M. D1 memaklumkan D2 bahawa JPJ tidak mempunyai apa-apa bantahan kepada pelaksanaan program BL1M. Selepas itu, beberapa mesyuarat telah diadakan oleh JPJ untuk membincangkan pelaksanaan program BL1M. Program BL1M telah dilancarkan dengan yuran pendaftaran ditetapkan pada RM199 dan bukannya RM198. Selepas program BL1M dilancarkan, JPJ dipanggil untuk mesyuarat lanjut kerana terdapat pelbagai halangan dalam melaksanakan program BL1M disebabkan kekurangan kerjasama daripada institut memandu.

Plaintif-plaintif memfailkan tindakan ini, menuntut relif satu akuan bahawa program BL1M melanggar undang-undang, injunksi terhadap D2 dan defendan ketiga ('D3') daripada melaksanakan program BL1M, dan ganti rugi am, faedah dan kos. D3 telah membuat tuntutan balas terhadap plaintif untuk ganti rugi am, ganti rugi teladan dan injunksi terhadap plaintif daripada mengambil apa-apa tindakan undang-undang yang serupa dan seperti yang diplid kepada tribunal undang-undang yang lain. Isu-isu yang timbul ialah: sama ada defendan-defendan telah melakukan tort konspirasi terhadap plaintif-plaintif; sama ada D1 telah melanggar tanggungjawab statutori di bawah s 3(2) Akta Pengangkutan Jalan 1987 ('APJ') yang dibaca bersama dengan s 2 Akta yang sama; dan sama ada terdapat diskriminasi tidak adil yang diamalkan oleh D1 dan JPJ terhadap plaintif.

Diputuskan:

(1) D2 memberi keterangan bahawa iklan tersebut telah disediakan tetapi D1 tidak boleh mengingati sama ada dia pernah bersetuju atau menyokong penggunaan logo JPJ di dalam iklan untuk program BL1M dan dalam laman web BL1M ini. Setakat yang boleh diingatinya, pegawainya atau pihak yang menyediakan logo di laman web yang tidak mendapatkan persetujuannya. Keterangan D1 berdasarkan ingatan samar-samar tidak meyakinkan. Melalui fakta bahawa logo JPJ telah dicetak, bersama-sama dengan logo SHEB dan D3, dalam iklan dan laman web BL1M untuk program BL1M, ini menimbulkan andaian bahawa D1 dan JPJ telah memberikan sokongan mereka kepada program tersebut (lihat perenggan 47).

(2) Meskipun dengan ketiadaan perjanjian bertulis atau tersurat yang dibuat oleh D1 dan JPJ, dengan D2 dan SHEB, dan D3, boleh diandaikan daripada keterangan bahawa dari masa mesyuarat tersebut, terdapat satu perjanjian tidak rasmi, perkiraan atau persefahaman oleh pihak-pihak ini untuk membolehkan pelancaran program BL1M. Mahkamah berpuas hati bahawa terdapat satu perjanjian tidak rasmi, pemahaman atau perkiraan bahawa D1 dan JPJ akan bekerjasama dan bekerja bersama-sama dengan D2 dan SHEB, dan D3 untuk pelaksanaan dan pengurusan program BL1M (lihat perenggan 48 & 52).

(3) Pekeliling JKPIM menetapkan bayaran maksimum RM211 yang boleh dikenakan oleh mana-mana institut memandu untuk mendapatkan lesen B2. Jika mana-mana institut memandu mengenakan atas daripada bayaran maksimum yang dibenarkan, maka institut memandu tersebut melakukan suatu kesalahan. Walau bagaimanapun, Pekeliling JKPIM tidak menjadikannya suatu kesalahan jika mana-mana institut memandu mengenakan bayaran kurang daripada bayaran RM211 yang ditetapkan dalam pekeliling. Semasa program perintis dilaksanakan di Pekan, Pahang, yuran pendaftaran yang dikenakan adalah RM198, dan oleh itu

di bawah bayaran sebanyak RM211 yang ditetapkan di bawah Pekeliling JKPIM. Apabila D2 dan D3 mengenakan bayaran yuran pendaftaran sebanyak RM199 kepada setiap calon untuk mendapatkan lesen B2, bayaran tersebut tidak menyalahi undang-undang kerana tiada apa yang diperuntukkan dalam Pekeliling JKPIM yang menyatakan bahawa perkara tersebut dilarang atau merupakan satu kesalahan (lihat perenggan 64–65).

(4) Tiada bukti meyakinkan yang dikemukakan oleh plaintif-plaintif untuk menunjukkan bahawa defendan-defendan berpakat dengan satu sama lain dengan niat untuk mencederakan setiap seorang dan semua plaintif, sebagai sasaran tertentu, dan dengan itu menyebabkan kerugian ekonomi. Plaintif-plaintif mempunyai kebebasan untuk membuat keputusan sama ada untuk mengambil bahagian dalam program BL1M atau sebaliknya. Dalam kes ini, mereka memilih untuk tidak mengambil bahagian dalam program tersebut. Plaintif-plaintif telah gagal untuk membuktikan elemen kedua tort konspirasi, iaitu, untuk membuktikan tujuan yang sama atau niat untuk mencederakan plaintif-plaintif dengan kerugian ekonomi (lihat perenggan 77–78).

(5) Tiada dalam mana-mana pernyataan tuntutan iaitu plaintif memplid bahawa mereka mengalami kerosakan khas disebabkan tort konspirasi defendan-defendan. Penurunan plaintif-plaintif dalam jumlah calon berdaftar di institut memandu mereka bukanlah semata-mata disebabkan oleh program BL1M. Faktor-faktor lain juga perlu diambil kira. Oleh itu, plaintif-plaintif telah gagal membuktikan bahawa kerosakan yang dikatakan dialami oleh mereka adalah hasil daripada tindakan konspirasi defendan-defendan. Plaintif-plaintif tidak mengambil langkah-langkah untuk mengurangkan kerugian mereka (lihat perenggan 30, 79 & 105–106).

(6) Berdasarkan fakta-fakta kes, plaintif mempunyai kausa tindakan yang boleh dikekalkan yang membawa kepada isu-isu serius untuk dibicarakan. Oleh itu, tidak boleh diputuskan bahawa plaintif telah menyalahgunakan proses mahkamah atau telah berniat jahat dengan memfailkan tindakan ini terhadap D3. Tuntutan plaintif terhadap D1 hingga D5 ditolak dengan kos. Tuntutan balas D3 terhadap plaintif-plaintif juga ditolak (lihat perenggan 133 & 138).]

Notes

For cases on conspiracy to injure plaintiff, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 90–92.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241, CA (refd)

David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors [2009] 4 MLJ 253, HC (folld)

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (refd)

J T Stratford & Son Ltd v Lindley and others [1964] 2 All ER 209, CA (refd)

Lembaga Kemajuan Tanah Persekutuan (FELDA) and Anor v Awang Soh bin Mamat & 353 yang lain [2010] MLJU 34; [2010] 3 CLJ 895, FC (refd)

Lonrho Plc and others v Fayed and others (No 5) [1993] 1 WLR 1489, CA (refd)

Lum Sow Kuen v Chuah Choong Heong & Ors [1998] MLJU 39; [1988] 4 CLJ Supp 161, HC (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (refd)

R v Siracusa (Francesco) (1990) 90 Cr App R 340, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)

Government of India v Cairn Energy India Pty Ltd & Anor, The [2011] 6 MLJ 441, FC (refd)

Quartz Hill Consolidated Gold Mining Company v Eyre, The (1883) 11 QBD 674, CA (refd)

X and others (minors) v Bedfordshire County Council [1995] 3 WLR 152, HL (folld)

Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai [1981] 2 MLJ 21, FC (refd)

Legislation referred to

Federal Constitution art 8(1)
Motor Vehicles (Driving Schools) Rules 1992 rr 2, 3, 3(1), 9, 36
Road Transport Act 1987 ss 2, 3(1), (2)
Societies Act 1966

Alex Tan Chie Sian (Dennis Goh Teik Chuan with him) (Wong Kian Kheong) for the plaintiffs.

Normastura bt Ayub (Nurul Ainy Yahaya with her) (Federal Counsels, Attorney General's Chambers) for the first, fourth and fifth defendants.

Hafarizam Harun (Nor Emelia Iszeham with him) (Hafarizam Wan & Aishah Mubarak) for the second defendant.

Lim Kon Keen (Zulaikha bt Fardi with him) (Salehuddin Saidin & Assoc) for the third defendant.

Yeoh Wee Siam J:

INTRODUCTION

[1] The plaintiffs are driving institutes, and are permit holders licensed under the Motor Vehicles (Driving Schools) Rules 1992 ('the 1992 Rules').

[2] The first plaintiff filed its notice of discontinuance against the defendants on 29 January 2014. The first plaintiff's claim was accordingly struck out by the court.

[3] The eighth plaintiff orally prayed to discontinue its claim against the defendants on 23 October 2014. The court allowed the oral application and accordingly struck out the claim.

[4] The remaining eight plaintiffs are the second to the seventh plaintiffs, and the nineth and tenth plaintiffs ('P2', 'P3', 'P4', 'P5', 'P6', 'P7', 'P9', and 'P10' respectively, or 'the eight plaintiffs', or 'the plaintiffs').

[5] The plaintiffs are members of the Association of Malaysian Driving Institute (Persatuan Institut Memandu Malaysia) ('PIMA'), a society registered under the Societies Act 1966. The plaintiffs operate driving institutes throughout Malaysia.

[6] The first defendant ('D1') is sued in his capacity as the former Director General ('DG') of Road Transport appointed under s 3(1) of the Road Transport Act 1987 ('the RTA').

[7] The second defendant ('D2') is sued in his capacity as the Chairman of the UMNO Youth's Urban Affairs Secretariat (Secretariat Hal Ehwal Bandar Pemuda UMNO) ('SHEB'), being the initiator of the 1Malaysia Licence Aid (Bantuan Lesen 1Malaysia) ('BL1M') programme which had purportedly resulted in loss and damage to the plaintiffs. SHEB is a bureau under UMNO Youth Malaysia, and is not a registered society under the Societies Act 1966.

[8] The third defendant ('D3' or 'My EG') is a public limited company and sued in its capacity as the alleged administrator that managed the implementation of the BL1M programme in the whole country.

[9] The fourth defendant ('D4') is sued in his capacity as the DG of Road Transport appointed under s 3(1) of the RTA.

[10] The fifth defendant ('D5') is the Federal Government of Malaysia,

which is alleged to be vicariously liable for all the acts and omissions of D1 and D4.

[11] The dispute arose as a result of the implementation of the BL1M programme, which was a campaign for the public to obtain a Class B2 motorcycle licence ('B2 licence') at a lower cost.

[12] The plaintiffs claim that the defendants have committed the tort of conspiracy, that D1 has breached his statutory duty under the RTA, and that D1 and the JPJ had practised unfair discrimination against the plaintiffs.

BACKGROUND FACTS

[13] In early 2012, D2 met D1, when D2 was still the DG, and proposed to D1 to introduce a special programme for obtaining the B2 licence. D2 proposed to implement the special programme in all Parliamentary constituencies throughout Malaysia.

[14] D1 requested that the special programme be implemented as a pilot programme before introducing it throughout Malaysia ('pilot programme'). D1 requested D2 to discuss the proposal with PIMA.

[15] On 2 May 2012, the Road Transport Department (Jabatan Pengangkutan Jalan) ('JPJ') held a meeting to discuss the implementation of the pilot programme. D2 attended the meeting.

[16] The pilot programme was implemented in Pekan, Pahang under the joint efforts of SHEB under D2, JPJ and PIMA. Under the pilot programme:

(a) the target group was youths who were aged between 21 to 40 years old; and

(b) the registration fee was RM198 per person and the fee was fully sponsored by SHEB/UMNO Youth.

[17] On 25 July 2012, a post-mortem meeting was held to discuss the pilot programme ('post-mortem meeting'). The post-mortem meeting was chaired by D1 and also attended by D2 (CBOD2 Pt B at pp 10–13, at p 13).

[18] By a letter dated 22 November 2012, D2 wrote to D1 informing D1 that the BL1M programme ought to be implemented throughout Malaysia. D2 also proposed, inter alia, that the same terms under the pilot programme, including the registration fee of RM198, be applied for the BL1M programme (CBOD2 Pt B at p 14).

[19] By a letter dated 26 November 2012, D1 informed D2 that JPJ did not have any objection to the implementation of the BL1M programme throughout Malaysia (CBOD2 Pt B at p 15). A

[20] Subsequently, a few meetings were held by JPJ to discuss the implementation of the BL1M programme: B

7 December 2012	JPJ and PIMA were informed that the implementation of BL1M would be different from the pilot programme, namely, among others, that D3 would be appointed to manage the registration of candidates for the B2 licence and collection of the fee. The registration fee of RM198 would not be sponsored, but is to be paid by the candidates. The age qualification was also lowered to 17 years old, as compared to 21 years old under the pilot programme. PIMA strongly objected to the implementation of the BL1M programme (CBOD2 Pt B at pp 16–22).
26 December 2012	PIMA maintained its objection towards the implementation of the BL1M programme. JPJ directed SHEB (under D2), D3 and PIMA to negotiate on the amount of registration fee for the BL1M programme, and to inform JPJ of the outcome within two days from the date of the meeting (CBOD2 Pt B at pp 23–28).

C D E

[21] No subsequent meeting was held after the meeting on 26 December 2012. F

[22] On 31 January 2013, the BL1M programme was launched by the Prime Minister of Malaysia ('PM') in Alor Setar, Kedah with the registration fee fixed at RM199, instead of RM198. G

[23] After the BL1M programme was launched, JPJ called for further meetings:

4 March 2013	The meeting was called because there were various setbacks in implementing the BL1M programme due to the lack of cooperation from the driving institutes (CBOD2 Pt B at pp 29–35, and CBOD5 Pt B at pp 1–20).
11 March 2013	D1 purportedly threatened to suspend the permits of the driving institutes that refused to participate in the BL1M programme (CBOD5 Pt B at pp 21–31).
13 March 2013	D1 said that the implementation of the BL1M programme would be continued regardless of whether the driving institutes agree or otherwise (CBOD1 Pt B at pp 29–35).

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[24] By a letter dated 4 April 2013, the plaintiffs, through their solicitors, issued a letter, before filing an action, to the DG (CBOD1 Pt B at pp 29–35).

[25] By a letter dated 17 April 2013, JPJ invited the plaintiffs for a meeting (CBOD1 Pt B at pp 53).

[26] On 19 April 2013, the plaintiffs met the new DG ie D4. During the meeting, D4 stated there were problems arising from the issue of the BL1M programme, and the industry had suffered injury ('kecederaan') and damage. He requested that they try to treat the injury, and control the damage and minimise the issues (CBOD5 Pt B at pp 53–72, at pp 54–55 and pp 57–58).

[27] By a letter dated 19 April 2013, JPJ responded to the plaintiffs' letter before this action (CBOD1 Pt B at p 59).

[28] On 15 August 2013, the plaintiffs filed this action. The plaintiffs are seeking the reliefs of a declaration that the BL1M programme contravenes the law, an injunction against D2 and D3 from implementing the BL1M programme, and general damages, interests and costs.

[29] D3 has made a counterclaim against the plaintiffs for general damages, exemplary damages, and an injunction against the plaintiffs from taking any legal action of a similar nature and as pleaded to other legal tribunals.

ISSUES

[30] The issues arise from the following causes of action pleaded by the plaintiffs:

(a) whether the defendants have committed the tort of conspiracy against the plaintiffs;

(b) whether D1 had breached his statutory duty under s 3(2) of the RTA read together with s 2 of the RTA as pleaded in para 17 of the statement of claim ('SOC'); and

(c) whether there was unfair discrimination practised by D1 and JPJ against the plaintiffs as pleaded in para 19 of the SOC.

ANALYSIS AND FINDINGS

Whether the defendants have committed the tort of conspiracy against the plaintiffs

The law

[31] It is trite law that in order to succeed in a claim based on the tort of conspiracy, the plaintiffs must prove the following elements which have been summed up by the Court of Appeal in *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 as follows:

> In order to succeed in a claim based on the tort of conspiracy, the plaintiff must establish:
>
> (a) an agreement between two or more persons;
>
> (b) for the purpose of injuring the plaintiff; and
>
> (c) acts done in execution of that agreement resulted in damage to the plaintiff.

(See also Court of Appeal decision in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32).

Whether there is an agreement between the alleged conspirators

[32] In *R v Siracusa (Francesco)* (1990) 90 Cr App R 340 at p 349, the English Court of Appeal held:

> Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts.

[33] In *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437 at p 476, Nallini Pathmanathan J (as she then was) held:

> [112] As stated at the outset in relation to the law, the first element that has to be established is the existence of an agreement between the conspirators, namely Intrared and KFH, or a combination of action or concerted action between Intrared and another person or persons to injure the plaintiffs (see *Kuwait Oil Tanker Company SAK v Al-Bader and others*). As also stated in that case, *it is not necessary to show anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or that they deliberately combine, albeit tacitly to achieve a common end.* How then is this to be ascertained? As stated in *R v Siracusa* the existence of such an agreement or combination of action with a common purpose can only be inferred from overt acts. (Emphasis added.)

[34] In the present case, when D2 first sent his letter dated 22 November

2011 to D1 proposing that the BL1M programme be implemented throughout Malaysia (CBOD2 Pt B p 14), D1's subsequent reply letter to D2 dated 26 November 2012 stated that JPJ did not have any objection subject to procedure as as provided under the RTA and the Road Transport Rules and Regulations. D1 requested D2 to contact the JPJ Division for Licensing of Drivers to have coordination meetings and further action.

[35] The minutes of the meeting dated 7 and 26 July 2012 (CBOD2 Pt B pp 16–22, and CBOD Pt B pp 23–28) show that several main issues were raised to be discussed by all parties involved following the new proposal of SHEB which had introduced the concept and mechanism for the BL1M programme which was different from the pilot programme.

[36] The following main issues were discussed in the above two meetings on 7 and 26 July 2012:

(a) D3's role:

SHEB had appointed D3 to manage the activity of gathering and distributing the candidates for the applications for the B2 licence to the driving institutes, together with all registration fees collected by D3 and then handing over the fees to SHEB. SHEB would then channel the fees to the driving institutes. However, for the pilot programme, it was not D3, but PIMA, which was given that role. Therefore, PIMA did not agree with D2's proposal; and

(b) the rate for registration fee (or 'fee') was RM198:

The fee to be paid by SHEB to the driving institutes would be between RM150–RM160 per candidate. PIMA did not agree to the fee on the ground that it would burden the driving institutes since this fee is lower than the fee fixed in the letter or circular dated 27 August 2009 (CBOD1 Pt B pp 1–3) issued by the committee under the 1992 Rules ie the Jawatankuasa Perlesenan Institusi Memandu ('JKPIM' or 'committee'), ('JKPIM circular' or 'circular').

[37] It is observed that the JKPIM circular, signed by D1, as the Chairman of the JKPIM, has fixed the fee for obtaining the B2 licence at RM211, with an additional amount for extra expenses, if any, not exceeding RM50.

[38] Mat Aris bin Bakar ('PW1'), the President of PIMA, confirmed PIMA's above objection on the fee of RM150–RM160 to be paid by SHEB to the driving institutes.

[39] Mohd Ismail bin RP Mohd Ibrahim ('PW2'), P6's director, also confirmed the same.

[40] PW1, under cross-examination, confirmed that up to the time when the PM launched the BL1M programme on 31 January 2013, the issues raised at the meeting on 26 December 2012 have not been settled.

[41] Furthermore, D4 ('DW2') stated that there was no agreement between SHEB, D3 and PIMA regarding the fixing of the registration fee.

[42] Even YHM Dato' Raja Munir Shah bin Raja Mustapha ('DW5'), the executive director of D3, confirmed that at the meeting on 26 December 2012 the rate for the distribution of fee had not been finalised. There was no consensus reached.

[43] It is noted that para 3 January of the minutes of the meeting dated 26 December 2012 ended with the following decision:

> 3 KEPUTUSAN MESYUARAT
>
> 3.1 Y.Bhg. Dato' Pengerusi telah mengambil keputusan seperti berikut;
>
> i. SHEB UMNO, MyEG dan PIMA hendaklah berunding untuk menetapkan kadar harga bagi menyertai program BL1M dan mengemukakan maklumbalas mengenainya kepada JPJ dalam tempoh dua hari daripada tarikh mesyuarat diadakan.
>
> ii. Mesyuarat bersetuju bahawa pengagihan calon BL1M akan dibuat sendiri oleh SHEB UMNO ke Insitutut Memandu tanpa campurtangan pihak lain.
>
> iii. SHEB UMNO, MyEG dan PIMA hendaklah menyelesaikan semua isu-isu pelaksanaan yang gagal disepakati sebelum ini sebelum aktiviti pendaftaran calon BL1M bermula bagi mengelakkan berlakunya isu-isu yang boleh mencemar imej JPJ dan kerajaan.
>
> iv. SHEB UMNO hendaklah mengemukakan kertas konsep cadangan baru pelaksanaan BL1M NRO kepada JPJ setelah mengambilkira semua isu-isu berbangkit diselesaikan.
>
> v. Mesyuarat susulan akan diadakan dalam tempoh terdekat setelah semua keperluan JPJ sepertimana yang dibincang dan diputuskan tersebut diselesaikan sewajarnya.
>
> vi. Mesyuarat menetapkan bahawa semua pihak yang terlibat perlu memberi kerjasama dan komitmen yang sepenuhnya bagi menjayakan program berkenaan ...

[44] D1 conceded during cross-examination that prior to 31 January 2013, he had knowledge that the BL1M programme would be launched on 31 January 2013.

[45] D4, who was then the Deputy DG, stated that he attended the

launching ceremony of the BL1M programme on 31 January 2013 upon the direction of D1, who was then the DG.

[46] From the above evidence, it is clear that up to the meeting on 26 December 2012, there was no consensus reached by D1 and JPJ, with PIMA and D2/SHEB and D3 on the implementation of the BL1M programme throughout Malaysia. The registration fee and other issues on registration of candidates had not been agreed upon and SHEB was requested to put up a new concept paper with new proposals to JPJ before the 'NRO' or National Roll-Out of the BL1M programme. At that point, there was certainly no formal or informal agreement, or any overt act by the defendants to conspire against the plaintiffs as alleged.

[47] However, it is observed that the fee of RM199 appeared on both the advertisement for the BL1M programme and BL1M's website, and these two documents appear to have the endorsement of JPJ because of JPJ's logo being printed therein (CBOD1 Pt B at p 60, and CBOD4 Pt B at pp 87–89). Both D2 and DW5 (for D3) agreed that the advertisement for the BL1M programme and BL1M's website were prepared before the launching of the BL1M programme on 31 January 2013. However, D2 testified that the advertisement was prepared by SHEB, and it did not involve the JPJ. On the other hand, D1 could not remember whether he had ever agreed to or supported the use of the JPJ logo in the advertisement for the BL1M programme and in BL1M's website. As far as he could remember, his officer or the party preparing the logo on the website did not get his consent. In my view, D1's evidence based on his vague memory is not convincing. By the fact that JPJ's logo was printed, together with the logos of SHEB and D3, in the advertisement and the BL1M website for the BL1M programme, it gives rise to the inference that D1 and JPJ were lending their support to the programme.

[48] Therefore, notwithstanding the absence of a written or express agreement being made by D1 and JPJ, with D2 and SHEB, and D3, it can be inferred from the evidence adduced thus far, that from the time of the meeting on 26 December 2012 up to 31 January 2013, there was an informal agreement, arrangement or understanding by these parties to enable the launch of the BL1M programme to take place on 31 January 2013. This is despite their knowledge of PIMA's objections raised in the meetings on 7 and 26 December 2012.

[49] After the launch of the BL1M programme 31 January 2013, the following meetings were held:

(a) Meeting on 4 March 2013

D1 agreed in cross-examination that during this meeting he did threaten

PIMA by saying:

> Buat dalam suasana yang nak membantu, kalau nak buat masalah saya boleh buat masalah. (CBOD5 Pt B p 10 column 54).

(b) Meeting on 11 March 2013

D1 threatened to suspend the driving permits of the driving institutes that refused to participate in the BL1M programme as follows:

> Kita ikut cara saya ... kami respect ... susah juga kan dan saya boleh tahu bila saya buat setuju harga ini. Bila MyEG pergi daftar calon dekat IM dia tak nak reject kerana harga itu, *saya akan show cause kerana tak mahu menerima calon, tak kisah la. Saya gantung dulu lepas itu cerita kemudian* dan saya akan mesyuarat JKPN bila? *17 saya akan gantung pada 17*. Kalau nak bawa Mahkamah pun tak apa, ada pasal lambat lagi Mahkamah dia akan ambil masa 6 bulan setahun masa itu saya pun tak ada, KP baru yang tak senang. Saya, sekarang saya nak selesai masalah dihadapan saya sebelum 22. Bagi peluang saya keluar barisan dengan senang hati. Selama ini kita dah bagi semua kat IM, MYEG tak akan KP nak bersara tak bagi senang hati dia, betul tak? *Sebelum ini berapa IM saya gantung, berapa? Tak ada, tapi kali saya gantung sebab lepas saya gantung saya tak ada. 17 haribulan saya gantung siapa tak nak pada harga kita setuju ini saya gantung lepas ini* apa nak jadi jadi saya tak ada. Panggil saya saksi sahaja bukan saya yang kena. Saya pergi Kerajaan Malaysia ...kes saya kata Tuan Hakim saya dah tua saya tak berapa ingat ... tak ingat dah ... (CBOD5 Pt B p 25 column 64). (Emphasis added.)

[50] D1, D4 and D5 contend that the JPJ was only involved in the BL1M programme due to JPJ's licensing functions for the B2 licence, and its regulatory powers under the RTA and its rules. However, from the minutes of the meetings on 4 March 2013 and 11 March 2013, it is clear that D1 was in fact applying the stick on PIMA and the driving institutes (Institut Memandu/IMs) to accept the BL1M programme and the fee of RM199. Otherwise, their permits would be suspended. However, it is to be noted that the plaintiffs' witnesses admitted in court that up till today none of their permits have been suspended for their non-participation in the BL1M programme, and they are still dealing with JPJ in the usual course of business. That, however, does not detract from the fact that in D1's eagerness to ensure the success of the BL1M programme, D1 did threaten PIMA that he would suspend the permits of the driving institutes if they did not participate in the programme.

[51] As for D2 and D3's involvement, it is not disputed that it was D2 who had initiated the BL1M programme and approached D1 for assistance. D2 then enlisted the services of D3 to register the candidates for the B2 licence and collect the fees. Next, D3 would channel the fees collected to SHEB, which would give part of the fee collected from each candidate ie RM150–RM160 to the driving institute. D3 also provided the space and facilities to conduct the

computer tests for the candidates. It is only when the candidates pass such tests that they go for practical training at the driving institutes.

[52] From the totality of the evidence, the court is satisfied that there is an informal agreement, understanding or arrangement that D1 and JPJ would cooperate and work together with D2 and SHEB, and D3 for the implementation and management of the BL1M programme.

Whether the agreement is for the purpose of injuring the plaintiffs

[53] The tort of conspiracy to cause economic loss is divided into conspiracy by lawful means, or conspiracy by unlawful means. The governing principles have been summed up by the learned High Court judge in *Lum Sow Kuen v Chuah Choong Heong & Ors* [1998] MLJU 39; [1988] 4 CLJ Supp 161 at pp 172–173 as follows:

> From the leading cases on the law of conspiracy, namely *Lonrho Ltd and others v Shell Petroleum Co Ltd and others (No 2)* [1981] 2 All ER 456, *Lonrho plc v Fayed and others* [1991] 3 All ER 303, *Aik Ming* and *Seagate Technology (s) Pte Ltd & Anor v Heng Eng Li & Anor* [1994] 1 SLR 534 and affirmed by the Singapore Court of Appeal on the issue of conspiracy and reported in *Seagate Technology Pte Ltd & Anor v Goh Han Kim* [1995] 1 SLR 17 at pp 23–26 and the commentary in *Clerk & Lindsell on Torts* (17th Ed) (1995) at pp 1267–1287, the following principles can be distilled:
>
> (1) There are two ways in which the tort of conspiracy can be committed, ie, two or more persons pursuant to an agreement or arrangement combine –
>
> (a) to injure a plaintiff by lawful means and cause him economic loss (the unlawful purpose or lawful means conspiracy); and
>
> (b) to commit an unlawful act and cause the plaintiff economic loss by that unlawful act (the unlawful means conspiracy).
>
> It is essential to prove the agreement or arrangement, intention and the actual injury.
>
> In the lawful means conspiracy, the plaintiff must prove that the sole or predominant purpose of the conspiracy is to injure the plaintiff.
>
> If the predominant purpose of the defendants is to protect or advance their own self-interest, even though damage to the plaintiff is an unintended consequence, it is not actionable.
>
> The lawful acts or unlawful means for purposes of the tort may be crimes or torts or breaches of statutory provisions.
>
> The burden of proving the existence of an agreement or arrangement among the defendants is on the plaintiff and a high degree of proof is required.

[54] In the present case, the plaintiffs have pleaded that the defendants conspired by unlawful means to injure the plaintiffs.

[55] The plaintiffs contend that D1, D2, D3 and JPJ had acted unlawfully in implementing the BL1M programme in the following matters:

(a) the registration fee offered under the BL1M programme, namely, RM199 was contrary to the fee of RM211 as prescribed under the JKPIM Circular. The JKPIM Circular was issuer 36 of the 1992 Rules pursuant to r 9 of the 1992 Rules. Under, any person who fails to comply with r 9 of the 1992 Rules commits an offence; and

(b) SHEB and D3 carried out the functions of a driving institute despite not having any permit pursuant to the 1992 Rules. In this regard, the plaintiffs adduced evidence to show that:

(i) the function of a driving institute starts from the point of registering a candidate (CBOD2 Pt B at p 8). Under the BL1M programme, this function was taken over by D3 (CBOD4 Pt B at p 93); and

(ii) the function of a driving institute when registering a candidate includes collecting the relevant registration fee. Under the BL1M programme, D3 was in charge of collecting the registration fee (CBOD4 Pt B at p 93).

Under r 3(1) of the 1992 Rules, no person shall operate a driving institute unless he is a holder of a permit. Rule 36 of the same Rules provides that any person who fails to comply with r 3 of the 1992 Rules commits an offence.

[56] The plaintiffs submit that that D1 and JPJ had knowingly condoned the various contraventions of the provisions of the 1992 Rules in the implementation of the BL1M programme. The means utilised by D1 and JPJ, and D2 and D3 to implement the BL1M programme were unlawful. Therefore, the defendants had a conspiracy to injure the plaintiffs by unlawful means.

[57] The question now is whether the defendants have conspired to use unlawful means to injure the plaintiffs. This matter is hinged on the legal requirements of the JKPIM circular, and whether mandatory compliance with the contents of the circular is required.

The JKPIM circular (CBOD1 Pt B at p 1–3)

[58] Paragraph 7 of the JKPIM circular states that the circular was issued under r 9 of the 1992 Rules.

[59] The important provisions of this circular, dated 27 August 2009 and effective from 1 September 2009, to be noted are:

2. Sepertimana tuan sedia maklum, YAB Perdana Menteri pada 11 Julai 2009 telah mengumumkan mengenai kadar bayaran belajar dan kadar lesen memandu bagi motosikal kelas B2 sebanyak RM211 yang akan berkuatkuasa mulai 1 September 2009. Sehubungan itu, Jawatankuasa Pelesenan Institusi Memandu (JKPIM) berdasarkan keputusan Kerajaan tersebut menetapkan komponen kadar fi yang dikenakan oleh Institut Memandu mengadakan latihan dan ujian memandu motosikal kelas B2 sahaja adalah sebagaimana jadual berikut:

[60] The fee schedule, and the additional fee schedule that followed, stated the fee of RM211, and the additional fee of RM50 respectively.

[61] The plaintiffs' case is that pursuant to the JKPIM circular, JKPIM had imposed a fixed fee of RM211 for obtaining the B2 licence, and driving institutes are allowed to charge an additional fee of no more than RM50 for other specified items in the circular. The plaintiffs further contend that the effect of the circular is to make the fee for obtaining the B2 licence a 'price-controlled' item.

[62] As submitted by counsel for the plaintiffs, it is trite law that the construction of a written document is a question of law and the court is not bound by any concession made by any of the parties as to what its language means. There is no room for discretion to be exercised when it comes to the question of construction of a written document (see Federal Court decision in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 at pp 458A–E, Court of Appeal decision in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 and Court of Appeal decision in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 at pp 44G–H).

[63] Therefore, the construction of the JKPIM circular is a question of law to be determined by this court, and not by witnesses through their oral evidence as contended by counsel for D1, D4 and D5.

[64] Upon a careful construction of the JKPIM circular, I agree with the submission of counsel for D1, D4 and D5, that the JKPIM circular has fixed the maximum fee of RM211 that can be charged by any driving institute for the B2 licence. If any driving institute charges above the maximum fee allowed, then the driving institute commits an offence. However, I observe that the JKPIM circular is silent on making it an offence if any driving institute charges less than the RM211 fee that is prescribed in the circular. It is to be noted that when the pilot programme was implemented in Pekan, Pahang, the registration fee charged was RM198, and therefore below the fee of RM211 fixed under the JKPIM circular. Yet, PIMA did not object to it.

[65] I am of the opinion that when D2 and D3 charged each candidate for the B2 licence the registration fee of RM199, it is not unlawful because there is nothing provided in the JKPIM circular to state that it is prohibited, or is an offence.

Whether D2 and D3 were performing the functions of a driving institute to require them to have a permit under the 1992 Rules

[66] Rule 2 of the 1992 Rules provides for the following definitions:

> 'driving institute' means any driving school equipped with circuit facilities for practical training and classrooms for theoretical training;
>
> 'driving instructor' means any person issued with a certificate under rule 10 to give driving instruction;
>
> 'driving school' means any institution issued with a permit under rule 7 for purposes of giving instruction to pupils in driving motor vehicles;
>
> 'permit' means the driving school permit or driving institute permit as prescribed in the First Schedule:

[67] Rules 3 and 9 of the 1992 Rules provide as follows:

> 3 Driving Schools or Instructors not to operate without permit
>
> (1) No person shall operate a driving school or a driving institute unless he is a holder of a permit.
>
> (2) No person shall provide driving instruction to any pupil unless he is a driving instructor.
>
> (3) Any person who contravenes subrules (1) and (2) shall be guilty of an offence.
>
> 9 Conditions of permit
>
> Every permit granted under these Rules shall —
>
> (a) be used only for the area or areas of operation for which it is issued;
>
> (b) be prominently displayed at the registered office of the driving school or institute;
>
> (c) be valid only for the individual or partnership or company in whose name it is issued and shall not be transferable;
>
> (d) not entitle the holder to set up a branch or sub-office unless he has obtained prior approval of the Committee;
>
> (e) not entitle the holder to engage any driving instructor not licensed under his driving school or institute for institute for driving instruction;
>
> (f) not entitle the holder to use any vehicle not licensed under his driving school or institute for driving instruction; and

(g) be subject to any other condition or conditions as may be imposed by the Committee from time to time.

[68] It is an undisputed fact that D3 was not involved in the pilot programme.

[69] D2 testified that after the pilot programme at Pekan, Pahang, he decided to discuss with D3 on whether D3 can assist in the BL1M programme as D3 has the necessary resources and infrastructure. D2, on behalf of SHEB, then invited and appointed D3 to participate in the BL1M programme.

[70] DW5 (for D3) confirmed that D3's involvement in the BL1M programme is only to organise the candidates and register them into the BL1M programme, and collect the fees. D3 provided a help desk and the necessary facilities for the computer tests to be conducted.

[71] From a reading of r 3 of the 1992 Rules, it is clear that a permit is only required if a person operates a driving school or a driving institute. When r 3 is read together with the definitions of 'driving institute' and 'driving school' in r 2, it is clear that D2 and D3 are not operating a driving school or driving institute. This is because both D2 and D3 do not operate a driving institute or driving school with 'circuit facilities for practical training *and* classrooms for theoretical training'. (Emphasis added.) There is no evidence that D2 and D3 have such circuit facilities for practical training. Even though D3 provided the space for the candidates to sit for the computer tests, there is no evidence that D3 provided classrooms in order to give theoretical training to the candidates.

[72] On the other hand, D2 gave evidence on the relationship between SHEB, D3 and JPJ in the BL1M programme which shows that D2 and D3 were not operating a driving school or driving institute but were instead only involved in a programme for the benefit of the youths who could not afford the high cost of the registration fee, or pass the requisite computer test at the first attempt in order to obtain a B2 licence. This is what D2 informed the court:

> Kita semua, sebenarnya Yang Arif, *when I first started doing, kita isu masalah, when we started to initiate this BL1M ini, of course supaya pulih masyarakat.* Kita tahu masalah-masalah di bawah di mana ramai yang kita kenalpasti, *isu-isu ramai yang bekerja yang memerlukan penggunaan lesen memandu. Mereka ini tidak mempunyai lesen. Dan akhirnya terpaksa menipu untuk mendapatkan pekerjaan.* Jadi, dan apabila kita kenalpasti, kita juga tahu umum tahu, apa nama ni, *masalah-masalah seperti isu gejala rempit* dan sebagainya yang berlaku berleluasa dan kita lihat dalam kaca TV juga mereka sering lari daripada pihak polis. Kenapa mereka lari? Kerana mereka tidak ada lesen. That's the, simple as that. Jadi untuk kita, *kita mendekati mereka dan membertanyakan apakah sebenarnya masalah yang you tak boleh ambil lesen? Dan antara sebabnya adalah sebab kos*. Dan maka saya *sebagai Pengerusi* ketika itu, *the first*

person yang saya berjumpa adalah Ketua Pengarah Jabatan Pengangkutan Jalan kerana Ketua Jabatan Pengangkutan Jalan alah authority yang bertanggungjawab terhadap pengeluaran lesen dan juga memastikan hal-hal undang-undang jalanraya. *Then Ketua Pengarah telah memperkenalkan saya kepada satu persatuan.* Persatuan. Persatuan apa nama persatuan ni? *Persatuan Institut Memandu Malaysia.* It's a persatuan memandu. *So kami bersetuju untuk mengadakan program perintis, a trial programme yang kita before want to roll-out the whole country* kita do, we did a trial programme dekat Pekan, Pahang. Dalam masa kita, masa dengan programme itu kita lihat, we have to see the real issue. The *real issue* kat sini sebenarnya *selain daripada fees*, kami juga dapati masalah dia adalah *masalah ujian berkomputer* yang dikendalikan oleh MyEG. *Kerana mereka ini disebabkan buta IT dan tidak tahu menulis*. Setengah mereka ini dan beberapa kes-kes dan sebagainya, *jadi mereka ini gagal ujian komputer*. Dan apabila *mereka ni gagal ujian komputer berkali-kali,* yang *menyebabkan kos makin lama makin meningkat*. Untuk, so the root of the problem dekat sini ialah ujian berkomputer dan the fee. *We do not want to add anymore cost so with that, that's why we approach MyEG to help us to actually bagi dia orang ini free*. I mean Yang Arif, just for your record at last MyEG ini bagi unlimited lah. Come overlah, *come and do lah until you pass. Until you pass this exam.* (Emphasis added.)

[73] D2 further confirmed that JPJ's involvement in the BL1M programme is regarding the licensing of motor vehicles which is within its jurisdiction.

[74] D2 channelled part of the fee, ie RM150–RM160 out of the total fee of RM199 fee collected by D3, to the driving institute. Once the candidates pass the computer tests, they proceed to the driving institutes for practical training. JPJ then issues the B2 licence to successful candidates who have passed both the computer test and the driving test.

[75] I find that the involvement of D2 and D3 in the BL1M programme is only at the initial stage, and their roles are purely administrative in nature, being at the beginning of the stage of registration of candidates, the theory tests on knowledge of road traffic laws done through the computer, and D2 channeling part of the fee to the participating driving institutes. As submitted by counsel for D3, there is no law or rule that prohibits D3 from registering the candidates into the BL1M programme and administratively collecting the registration fee. I further observe that that there is no legal prohibition for D2 to channel part of the collected fee to the participating driving institutes. I am of the opinion that D2 and D3 do not fully perform the functions of a driving institute or driving school. They do not conduct practical training for the driving tests. Thus, there is no requirement for D2 and D3 to apply for a permit under the 1992 Rules. Neither are D2 and D3 committing an offence under the 1992 Rules for not possessing a permit to operate a driving institute or driving school. It logically follows that there is no basis for D1, D4, or the JPJ to take action against D2 and D3 for not having a permit under the 1992 Rules.

[76] It is clear that D2 and D3 were involved in the BL1M programme for the good of the community ie to enable those persons without a B2 licence to obtain one at a lower cost, and more easily ie being given the opportunity to repeat sitting for the computer test with no additional cost for each repeated test until the candidate passes.

[77] There is no cogent evidence adduced by the plaintiffs to show that the defendants conspired with each other with the intention to injure each and every one of the eight plaintiffs, as specific targets, and thereby causing economic loss. The eight plaintiffs have the liberty to decide whether to participate in the BL1M programme or otherwise. In this case, they opted not to participate in the programme.

[78] In view of the above findings, I hold that the plaintiffs have failed to prove the second element of the tort of conspiracy, namely, to prove the common purpose or intention to injure the plaintiffs with economic loss.

Whether the acts done in execution of that agreement resulted in damage to the plaintiffs

[79] It is noted that nowhere in the SOC, did the plaintiffs plead that they suffered special damages due to the defendants' tort of conspiracy.

[80] In para 16 of the SOC, the plaintiffs pleaded that due to the actions taken by D1, D2, D3 and D4, the plaintiffs suffered serious loss and damage in the following forms:

(a) a serious decrease in the registration of candidates for the B2 licence; and

(b) the plaintiffs' incomes were reduced following the decrease in the registration of candidates for the B2 licence.

[81] In para 25(c) of the SOC, the plaintiffs pleaded that D4 still failed to pay compensation to them for all loss and damage suffered by them resulting from the failure and negligence of D4 regarding the BL1M programme.

[82] In para 26 of the SOC, the plaintiffs prayed, inter alia, for the relief of general damages to be assessed by the court.

[83] In *Lonrho Plc and others v Fayed and others (No 5)* [1993] 1 WLR 1489 at p 1494B, the English Court of Appeal stated:

> A plaintiff in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are

> not limited to a precise calculation of the amount of the actual pecuniary loss actually proved: ...

[84] Therefore, the plaintiffs here are required to prove actual pecuniary loss, before damages are considered to be at large.

[85] In *Lembaga Kemajuan Tanah Persekutuan (FELDA) and Anor v Awang Soh bin Mamat & 353 yang lain* [2010] MLJU 34; [2010] 3 CLJ 895 the Federal Court stated:

> In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and throw them at the head of the court, saying: 'This is what I have lost, I ask you give me these damages'. He has to prove it.

[86] Thus, it is incumbent upon the eight plaintiffs to prove their actual pecuniary or economic losses before they can claim damages.

[87] The plaintiffs rely on the following undisputed facts:

(a) a total of 210,166 candidates had registered under the BL1M programme and the number of candidates far exceeded the total number of candidates registered with all the 191 driving institutes for an entire year (CBOD5 Pt B at p 2);

(b) it is D3's pleaded case that there were approximately 137,000 candidates who made payment under the BL1M programme;

(c) BL1M was launched during school holidays which were considered as peak season for candidates to take up the B2 licence (CBOD 2 Pt B at p 26); and

(d) D4 acknowledged at the meeting on 19 April 2013 that the plaintiffs had suffered damage as a result of the implementation of the BL1M programme.

[88] The above undisputed facts, however, do not show the actual damage suffered by each of the eight plaintiffs. The 210,166 candidates who had registered under the BL1M programme are throughout the country. The plaintiffs failed to show how many out of these 210,166 candidates reside in the areas where the plaintiffs operate their respective driving institutes. This similarly applies to the 137,00 candidates who had made payment under the BL1M programme. As for D4's statement made at the meeting on 19 April 2013, D4 was actually referring to the damage suffered by the industry, and not specifically by each of the plaintiffs.

[89] Regarding D1's threat to suspend the permit of the driving institutes,

guidance can be taken from the case of *J T Stratford & Son Ltd v Lindley and others* [1964] 2 All ER 209 where Salmon LJ stated as follows:

> As is made plain by Lord Devlin in *Rookes v Barnard*, a threat cannot cause damage unless the person threatened yields to it. If he does not, and the threatened illegal act is carried out, it is that act and not the threat which causes the damage which may ensue. Accordingly, in my judgment, it is plain that, quite apart from any other consideration, the direct threat made to the plaintiffs affords them no cause of action, because they never yielded to it and, accordingly, the threat as a threat caused them no damage.

[90] In the present case, it is observed that the plaintiffs did not yield to D1's threat. Despite D1's threat, the plaintiffs still opted not to participate in the BL1M programme. Therefore D1's threat, as a threat to the plaintiffs, caused them no damage. Until today, the plaintiffs' respective permits to operate their driving institutes have not been suspended by the DG or JPJ despite the fact that the plaintiffs did not participate in the BL1M programme.

[91] D2 disputed the plaintiffs' allegation that the BL1M programme was launched during the school holidays or peak season. He stated that they avoided such periods. It is noted that the launch of the BL1M programme by the PM on 31 January 2013 was not during the end of the year long school holidays. The new school year would have started in early January 2013.

[92] Be that as it may, I now consider the following evidence adduced by the plaintiffs for establishing damage. The plaintiffs produced their respective 'e-driving' statements which showed a decline in the number of candidates for the B2 licence before and after the implementation of the BL1M programme:

(a) P3's summary of 'e-driving' statements (CBOD6 Pt B at pp 1–2) show that P3 had suffered a drop of 22.16% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to years 2011 and 2012;

(b) P4's summary of 'e-driving' statements (CBOD7 Pt B at p 664) show that P4 had suffered a drop of 792 in the number of candidates when the BL1M programme was implemented in year 2013 as compared to year 2012;

(c) P5's summary of 'e-driving' statements (CBOD6 Pt B at pp 102–103) show that P5 had suffered a drop of 8.8% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to years 2011 and 2012;

(d) P6's summary of 'e-driving' statements (CBOD6 Pt B at p 213) show that P6 had suffered a drop of 34.22% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to year 2012;

(e) P7's summary of 'e-driving' statements (CBOD7 Pt B at pp 260–261) show that P7 had suffered a drop of 21.8% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to year 2012;

(f) P8's summary of 'e-driving' statements (CBOD6 Pt B pp 451–452) show that P8 had suffered a drop of 27.84% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to year 2012; and

(g) P9's summary of 'e-driving' statements (CBOD6 Pt B at pp 580–581) show that P9 had suffered a drop of 34.3% in the number of candidates when the BL1M programme was implemented in year 2013 as compared to year 2012.

[93] It is noted that P2 and P10 did not adduce any evidence of any loss that they have suffered. Neither were any of their 'e-driving' statements produced.

[94] P2 and P10 have therefore failed to prove the third element required for the tort of conspiracy ie that they suffered damage as a result of the defendants' acts of conspiracy.

[95] As for P3, P4, P5, P6, P7 and P9, they submit that they suffered a decline in the number of candidates as a result of the implementation of the BL1M programme. However, they could not prove to the satisfaction of the court that out of the 210,166 registered candidates, or out of the 137,000 who had made payment under the BL1M programme, such specific named candidate or such specific number of candidates reside in the areas where these plaintiffs are operating their driving institutes, and, but for the BL1M programme, such candidates would have registered with the driving institutes operated by the plaintiffs at the material time.

[96] As submitted by counsel for D1, D4 and D5, the plaintiffs' 'e-driving' statements did not show the actual loss suffered by the plaintiffs resulting from the BL1M programme. The percentage given was based on the decrease in the number of candidates, and not based on the total payment which had been received from each candidate who had successfully obtained the B2 licence.

[97] Moreover, the plaintiffs' witnesses are not the individuals who have knowledge on the method of calculation and/or had themselves made the

percentage of calculation. They merely produced calculations which are print-outs from their computers, but without supporting documents to show how the calculations were done. This is borne out by the following evidence of the respective plaintiffs' witnesses which have been highlighted by counsel for D1, D4 and D5 in their reply submissions:

PW5 (for P3)

[98] PW5 admitted that he was not sure of the accuracy of the particulars and the calculations printed out from P3's computer.

PW10 (for P4)

[99] PW10 did not have the total of the fees collected by P4. He did not have the figures for the total number of candidates for year 2011 to compare with years 2012 and 2013.

PW6 (for P5)

[100] PW5 admitted that the calculations were done by the staff of his Accounts Division.

PW2 (for P6)

[101] PW2 admitted that the calculations are inaccurate since the particulars for years 2012 and 2013 are up to only the month of October. The calculations that he tendered were printed out from the computer. The calculations were done by his staff.

PW7 (for P7)

[102] PW7 could not confirm the accuracy of the documents that he had produced in court since he did not prepare the documents. Instead, his staff prepared the documents. Therefore, PW7 was not sure if the information given in the documents are accurate or otherwise.

PW8 (for P9)

[103] PW8 admitted that his audit accountant did the calculations. He agreed that the document at CBOD 7 Pt B p 581 did not show the percentage of the decrease in P9's income.

[104] Under cross-examination by counsel for D1, D4 and D5, the plaintiffs' witnesses ie PW2, PW4, PW6, and PW7 respectively admitted that there are other factors which affect the number of candidates registered at their driving institutes, for example, population, whether it is school holidays ie the season, marketing strategy, location or area of operation and the weather ('other factors').

[105] After considering the evidence adduced, the court is satisfied that the plaintiffs' decrease in the number of registered candidates at their driving institutes is not caused solely by the BL1M programme. The other factors have to be considered as well. Therefore, the court rules that the plaintiffs have failed to prove that the alleged damage suffered by them respectively is as a result of the defendants' acts of conspiracy.

[106] It is also observed that the plaintiffs took no measures to mitigate their losses. It is trite law that in a tort matter, the onus is on the plaintiff to take all reasonable steps to mitigate the amount of damage (see Federal Court decision in *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21).

[107] Had the plaintiffs participated in the BL1M programme, it is highly probable that though they would get less in terms of registration fee per candidate, they would get more candidates under such an extensive programme (which had 210,166 registered candidates, and with 137,000 registered candidates who had paid up the registration fee), and therefore would not suffer any loss.

[108] Going by the above findings, the court holds that the plaintiffs have not succeeded in proving the required three elements to establish the tort of conspiracy against the defendants. Based on this cause of action of the tort of conspiracy, the plaintiffs' claim ought to be dismissed.

Breach of statutory duty under s 3(2) of the RTA read together with s 2 of the RTA as pleaded in para 17 of the SOC

[109] Section 3(2) of the RTA provides:

> 3(2) The Director General shall have the general supervision and direction of all matters relating to road transport throughout Malaysia.

[110] As submitted by counsel for D1, D4 and D5, the plaintiffs did not state which definition in s 2 of the RTA must s 3(2) be read with. Therefore, this court would construe s 3(2) on its own, without reading it together with any specific definition in s 2 of the RTA.

[111] The leading authority on this question of law is the House of Lords decision in *X and others (minors) v Bedfordshire County Council* [1995] 3 WLR 152, Lord Browne-Wilkinson, inter alia, at p 166 stated:

> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. *However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.* There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. *If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class in shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer* ...
>
> Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus, legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, ie bookmakers and prisoners: see *Cutler v Wandsworth Stadium Ltd (in Liquidation)* [1949] 1 All ER 544; [1949] AC 398 *Hague v Deputy Governor of Parkhurst Prison and others* [1991] 3 All ER 733; [1992] 1 AC 58. *The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions*. (Emphasis added.)

[112] Counsel for the plaintiffs submits that:

(a) s 3(2) of the RTA imposes a statutory duty upon the DG to have general supervision and direction of all matters relating to road transport throughout Malaysia. Section 3(2) of the RTA is not a provision setting out the administrative and regulatory functions of the DG;

(b) the provisions of the RTA are only limited to matters involving, among others, the regulation of motor vehicles and of traffic on roads (see preamble to the RTA). In other words, the statutory duty imposed under s 3(2) of the RTA was for the protection of a limited class of the public; and

(c) there is no statutory remedy under the RTA when there is a breach of s 3(2) of RTA.

[113] The plaintiffs contend that D1, as the DG at the material time, had breached his statutory duty under s 3(2) of the RTA when he failed to take action:

(a) to stop the implementation of the BL1M programme; and

(b) against D2 and D3 for implementing the BL1M programme.

[114] In *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 4 MLJ 253 at p 265 Harmindar Singh JC (as he then was) stated:

> [35] In essence, however, the plaintiff is arguing that the fourth defendant had breached the statutory duty as set out in s 4 of the Act ...

[115] The learned JC then referred to the above decision in *X and others (minors)* and went on to say:

> [36] Considered in this light, it seems to me that s 4 of the Act in no way confers any such right of private action by a member of the public injured by a breach. I think s 4 is more in the nature of general provisions outlining the administrative and regulatory functions of the fourth defendant. On this ground alone, the action against the fourth defendant should be dismissed.

[116] Applying the principles in *X and others (minors)*, and *David Chelliah* to the present case, I am of the opinion that s 3(2) of the RTA is a general provision which gives the DG the statutory administrative and regulatory powers for the general supervision and direction of all matters relating to road transport. However, it does not provide for the specific powers of the DG on any specific matter. Thus, it does not create or give rise to a statutory right of action for any adversely affected person, including the plaintiffs, by the breach of its statutory provisions.

[117] On this ground alone, the plaintiffs' claim based on the cause of action of breach of the DG's statutory duty under s 3(2) of the RTA must fail.

[118] As for the plaintiffs' contention that the DG had breached his statutory duty for not taking any action against D2 and D3 for implementing the BL1M programme, I have already held in the earlier part of this judgment under the plaintiffs' cause of action for the tort of conspiracy that D2 and D3 are not operating any driving school or driving institute. As such, they do not require a permit under the 1992 Rules to perform their administrative role in the initial stage of registration into the BL1M programme. Since they have not

committed any offence under the RTA or the 1992 Rules, there is no basis for the DG to take action against D2 and D3. As for charging and collecting the fee of RM199 per candidate, I have also earlier held that the JKPIM circular does not prohibit anyone from charging a fee which is less than the maximum fee of RM211 fixed under the circular.

[119] Here again, I hold that the DG has not breached any statutory duty under s 3(2) of the RTA for not taking action against D2 and D3. Therefore, even on this issue, the plaintiffs' claim must fail.

Whether there was unfair discrimination practised by D1 and JPJ against the plaintiffs as pleaded in para 19 of the SOC

[120] In para 19 of the SOC, the plaintiff pleaded the particulars of unfair discrimination against the plaintiffs as follows:

(a) the plaintiffs are required to charge the fee for the candidates for the B2 licence according to the JKPIM Circular. However, under the BL1M programme, the fee fixed did not comply with the contents of the circular;

(b) D4 did not take any action against D2 and D3 in connection with the fee offered under the BL1M programme. Moreover, D4 gave his support to the BL1M programme; and

(c) as a result of the implementation of the BL1M programme, the plaintiffs have suffered loss and damage.

[121] The plaintiffs rely on art 8(1) of the Federal Constitution which expressly provides that all persons are equal before the law and entitled to the equal protection of the law.

[122] The principles regarding the law on unfair discrimination have been stated by the Court of Appeal in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 as follows:

> In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:
>
> (a) *there must be some form of discrimination;*
>
> (b) *the discrimination must be unfair; and*
>
> (c) *there must be resultant harm or injury*. (Emphasis added.)

[123] The plaintiffs' case is that they had been discriminated by JPJ in that they were required to adhere to the JKPIM circular and could only charge the fee of RM211, failing which the plaintiffs run the risk of criminal prosecution,

whereas D2 and D3 were permitted to impose the fee of RM199 under the BL1M programme (which is less than the fixed fee of RM211 under the circular). A

[124] The plaintiffs submit that the discrimination suffered by them is unfair because: B

(a) The JKPIM circular was issued pursuant to r 9 of the 1992 Rules. Under r 36 of the 1992 Rules, any person who fails to comply with r 9 of the 1992 Rules commits an offence. In other words, whereas the plaintiffs run the risk of being prosecuted if they fail to comply with the circular, JPJ openly endorsed the fee of RM199 imposed under the BL1M programme; C

(b) JPJ had full knowledge of PIMA's objections to the implementation of the BL1M programme; D

(c) JPJ had knowledge, by the very nature of things, that implementing the BL1M programme would necessarily be injurious to the plaintiffs' economic interest; and

(d) the BL1M programme was implemented by D2 and D3 which did not have any permit pursuant to the 1992 Rules. E

[125] Regarding the above contentions of the plaintiffs, I am of the opinion that the plaintiffs would never run the risk of being prosecuted under the JKPIM circular for as long as they do not charge a fee which is higher than the maximum fixed fee of RM211, and an additional fee of RM50. Conversely, even if the plaintiffs opt to charge a fee which is lower than the maximum fixed fee, which is not prohibited under the JKPIM Circular, they cannot be prosecuted under r 36, read with rr 3 and/or 9 of the 1992 Rules since it is not an offence. F G

[126] D2 confirmed that the fee of RM199 under the BL1M programme was in fact decided by SHEB, and JPJ was not involved in deciding on the RM199. Therefore, as submitted by counsel for D1, D4 and D5, JPJ had nothing to gain from the matter. D1, D4, and JPJ are only involved in view of their licensing powers given under the RTA and its Rules and Regulations. H

[127] The plaintiffs were not prohibited from participating in the BL1M programme. They were given the liberty to participate in it. However, the plaintiffs chose not to participate in the programme. If the plaintiffs had participated in the BL1M programme, they would enjoy the same benefits as the other participating driving institutes. Thus, the plaintiffs cannot now contend that they were unfairly discriminated against. I

[128] As for D1, D4 and JPJ which did not take any action against D2 and D3, as I have held earlier, there is no reason for them to act against D2 and D3 since D2 and D3 are not offending the law by not possessing a permit under the 1992 Rules. D2 and D3 do not operate any driving school or driving institute. Therefore, they are not required to apply for and hold a permit issued under the 1992 Rules.

[129] I therefore hold that the plaintiffs have failed to establish the required elements to prove their cause of action based on unfair discrimination by D4 and the JPJ.

D3's counterclaim

[130] D3's alleged cause of action against the plaintiffs is abuse of court process by filing this malicious civil action.

[131] Regarding the matter of abuse of court process, this court had on 27 February 2014 dismissed with costs D3's application for striking out the plaintiffs' claim by a notice of application (enc 15), inter alia, for abuse of court process. D3 did not appeal the decision. It is therefore indirectly an admission by D3 that the plaintiffs' action is not an abuse of the court process.

[132] As for D3's allegation of malice on the part of the plaintiffs in filing this action, there is not cogent evidence adduced by D3 to this effect.

[133] I am of the opinion that based on the facts of the case, the plaintiffs have sustainable causes of action which give rise to serious issues to be tried. Thus, it cannot be held that the plaintiffs had abused the court process or had been malicious by filing this action against D3.

[134] DW5 (for D3) testified that D3 had to incur great expenses in order to defend this case. However, as submitted by the plaintiffs, as a matter of law, costs and expenses incurred in litigation are not damage for which an action would lie (see English Court of Appeal decision in *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674 at pp 682–683 and 690).

[135] In the absence of any cogent evidence, I hold that D3 has failed to establish that it had suffered any loss or injury as a result of this action by the plaintiffs.

[136] Accordingly, D3's counterclaim against the plaintiffs cannot succeed.

CONCLUSION

[137] In summary, the court holds as follows:

(a) regarding the tort of conspiracy:

(i) there is an informal agreement, understanding, or arrangement by D1 and JPJ, with D2 and SHEB, and D3 to implement and manage the BL1M programme. However, there is no common purpose or intention to injure the plaintiffs or cause them economic loss; and

(ii) the plaintiffs have failed to prove their actual pecuniary or economic loss;

(b) regarding breach of statutory duty: D1 and D4 have not breached the statutory duty under s 3(2) of the RTA; and

(c) regarding unfair discrimination: D1 and JPJ have not practised unfair discrimination against the plaintiffs.

DECISION

[138] Based on the above considerations, on a balance of probabilities, the court makes the following decision:

The plaintiffs' claim

The plaintiffs' claim against:

(a) D1, D4 and D5;

(b) D2; and

(c) D3,

is dismissed.

Costs of RM20,000 are to be paid by the plaintiffs jointly to each set of defendants as in para 138(1), (2) and (3) above, subject to the payment of an allocatur fee of 4% of the costs except for the costs awarded to D1, D4 and D5.

D3's counterclaim

D3's counterclaim against the plaintiffs is dismissed.

Costs of RM15,000 are to be paid by D3 to the plaintiffs jointly, subject to the

payment of an allocatur fee of 4% of the costs.

Order accordingly.

Reported by Afiq Mohamad